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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 325.

THE UNITED STATES, APPELLANT,

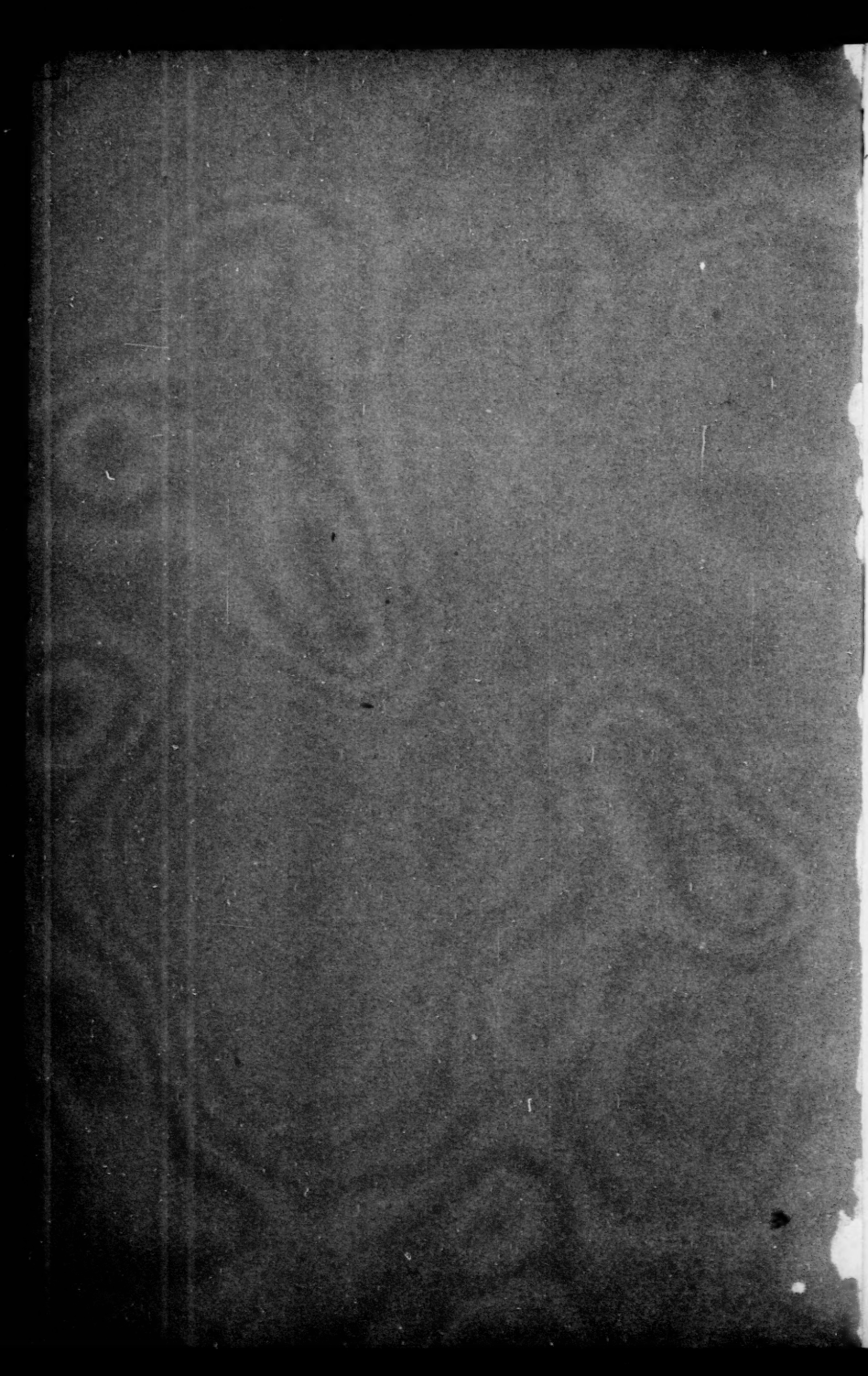
vs.

WILLIAM J. BARNETTE.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 21, 1895.

(15999.)



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INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Traverse	3	2
Findings of fact	4	2
Conclusion of law	6	4
Opinion	7	5
Judgment	10	8
Application for and allowance of appeal	11	8
Clerk's certificate	12	9

1 In the Court of Claims.

WILLIAM J. BARNETTE }
v. } No. 18132.
THE UNITED STATES. }

I.—*Petition.*

A preliminary petition was filed October 24, 1893, and on the 24th day of November, 1893, claimant filed his completed petition, to wit:

Completed petition, filed November 24, 1893.

To the Chief Justice and Judges of the Court of Claims:

The petition of William J. Barnette respectfully represents that he is a citizen of the United States and a lieutenant in the Navy. He further represents that under the orders of the Secretary of the Navy he served on the nautical school-ship St. Mary's from January 1, 1891, until the date of filing his petition, and has served on said vessel under the command of two officers of the United States Navy, to wit, from January 1, 1891, to January 3, 1891, under Commander A. S. Crowninshield,
2 and from January 3, 1891, to October 24, 1893, under Commander John McGowan. He further represents that during the whole of said period the St. Mary's belonged to the United States and was employed under the authority of law.

He further represents that he has been paid as in second five years' service, on shore duty ($2,200), from January 1, 1891, to and including March 31, 1891; as on sea duty ($2,600) from April 1, 1891, to and including November 22, 1891; as on shore duty from November 23, 1891, to and including March 24, 1892; as on sea duty from March 25, 1892, to and including November 11, 1892; as on shore duty from November 12, 1892, to and including date of his claim, the 24th of October, 1893, and he claims that for the periods above mentioned for which he has received shore pay, to wit, 559 days, he has been entitled to sea pay and a ration, and he brings this action to recover the difference, to wit, $780.25.

Petitioner further avers that he has always borne true allegiance to the United States; that no other action has ever been taken either in Congress or in the Departments on his claim than above set forth; that no person is interested therein except himself; that no assignment or transfer thereof has been made, and that he is justly entitled to the sum of ($780.25) seven hundred and eighty dollars and twenty-five cents, after allowing all just credits and offsets, and that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government, and he believes the facts as stated in the petition to be true.

WM. J. BARNETTE.
JOHN S. BLAIR,
Attorney for Claimant.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, a notary public in and for the county and State aforesaid, personally came William J. Barnette, who, being by me duly sworn, saith

that the contents of the foregoing petition are just and true to the best of his knowledge and belief.

WM. J. BARNETTE.

Sworn and subscribed before me this 23d day of November, anno Domini one thousand eight hundred and ninety-three.

In testimony whereof I have hereunto set my hand and official seal.

[SEAL.] JOS. W. TANTUM,
Notary Public, Kings County.

Certificate filed in New York County.

3 II.—*Traverse filed February 27, 1895.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

4 III.—*Findings of fact and conclusion of law. Filed March 18, 1895.*

The court upon the evidence finds the following to be the facts:

I.

The claimant has been a lieutenant in the Navy of the United States since 1872. On the 1st of January, 1891, in obedience to an order from the Secretary of the Navy, he reported to Commander A. S. Crowninshield for duty as executive officer on board the St. Mary's, a sailing vessel owned and employed by the United States.

He continued to perform the duties of executive officer and instructor from that day until October 24, 1893, the date of filing his petition. Commander Crowninshield, an officer of the United States Navy, commanded the vessel until January 3, 1891, when he was succeeded by Commander McGowan, also an officer of the Navy. Throughout claimant's service on said vessel he has received no orders except from these officers. Through him his junior officers received the orders of these commanding officers.

II.

Commander Crowninshield indorsed on claimant's order the fact that he had reported for duty, and a copy of said order was then filed with the United States paymaster at the New York Navy-Yard.

III.

While on the St. Mary's he has been paid by the United States as follows:

As in second five years' service, on shore duty ($2,200) from January 1, 1891, to and including March 31, 1891; as on sea duty ($2,600) from April 1, 1891, to and including November 22, 1891; as on shore duty from November 23, 1891, to and including March 24, 1892; as on sea duty from March 25, 1892, to and including November 11, 1892; as on shore duty from November 12, 1892, to and including date of his claim, the 24th of October, 1893, and he claims that for the periods above mentioned for which he has received shore pay, to wit, 559 days, he has been entitled to sea pay and a ration, and he brings this action to recover the difference, to wit, $780.25.

IV.

About the middle of May in each year the St. Mary's has gone on a cruise lasting until about the middle of October. The complement of officers is the commanding officer, the executive officer, one lieutenant, one ensign, and one surgeon. The commanding officer is required semi-annually to make written report to the Secretary of the Navy of the professional ability and the attention of his subordinate officers to the duty to which they have been assigned, as well as of their sobriety, health, and general conduct, and also of the efficiency of men under their special control. This report is in conformity to the general regulations requiring reports on the fitness of all officers of the Navy.

V.

The crew of the St. Mary's consists of twenty-two men of different grades and ranks, seven of whom are of the title seamen. These are all employed by the city of New York.

VI.

On board the ship there are two messes, the commander's mess and the wardroom mess. The plates, towels, etc., of the mess are furnished by the officers. The claimant contributed his share of their cost when he became attached to the vessel, he contributes from time to time to keep them up, and when he is detached he will sell out his share to his relief. The wardroom officers on a flagship average from twenty to twenty-two, and on a smaller man-of-war ten to fifteen; on account of the small number in the wardroom of the St. Mary's the expense of the mess is about 50 per cent greater for each man than upon a man-of-war or other larger vessel.

During the periods when the ship is not cruising the claimant's relation to the mess and the stateroom are precisely the same as when she is under sail. He is compelled to wear his uniform all the time while on duty; while at anchor he keeps his clothes in the stateroom which he occupies and in which he sleeps. He is on duty at the vessel every day, and in the matter of quarters, mess, and uniform there is no difference, whether the vessel is under sail, riding at anchor, or tied to a wharf.

VII.

Claimant's duties as executive are the care and preservation of the ship, looking after the crew, attending to the details of the organization and police of the ship.

He has been instructor of seamanship. The winter routine, in addition to the instruction in the ordinary school branches, includes seamanship, navigation, sailmaking, and practical exercises in these particular branches; also sending the boys aloft; they go over the masthead; also go aloft for the purpose of loosing and furling sails and reefing, and do other work necessary on shipboard. These things are done under claimant's orders. While the vessel is tied to the wharf, weather permitting, the boys are exercised every day in going aloft and out on the yard. A yard has been rigged for exercising seamanship with sails, in making, loosing, furling, and reefing, and that sort of instruction which relates purely to a seaman's life.

6 VIII.

The St. Mary's had been furnished for educational purposes by the Secretary of the Navy under the act 20th June, 1874 (18 Stat. L., p. 121); but the command of the vessel was always retained in an officer in the United States Navy. The nautical school on board of the vessel was established by the board of education of the city of New York. The vessel cruises ordinarily from about the 15th of May until some time in October. From October until May, as a rule, she does not cruise. The claimant has been allowed by the accounting officers of the United States sea pay while the vessel was on a cruise; but has been allowed only shore-duty pay when the vessel was not on a cruise and lying attached to a dock in the harbor of New York, he then, however, being and living on board and doing the duty and being subject to the regulations of a ship at sea. The claimant also acted as an instructor of the pupils of the nautical school on board of the St. Mary's, for which service he was paid by the board of education.

IX.

For a period of two and one-half years prior to December 31, 1890, the claimant had been attached to the U. S. S. Galena and had been on a cruise performing sea duty and receiving sea pay during that time.

X.

In the official routine of duty in the Navy Department ordinarily alternates the sea and shore duties of officers, so far as the same may be practicable, by assigning them alternately to sea and shore duties for periods of about three years each. The order of the Secretary of the Navy on the 30th December, 1890, assigning the claimant to duty on the nautical school-ship St. Mary's, was in these words:

Reply of the Navy Department.

NAVY DEPARTMENT,
Washington, December 30, 1890.

SIR: You are detached from the Minnesota on the 31st inst., and will report to Commander A. S. Crowninshield on the same day for duty as

executive on board the nautical school-ship St. Mary's as the relief of Lieutenant C. C. Cornwell.

This employment on shore duty is required by the public interests, and such service will continue until 31 December, 1893, unless it is otherwise ordered.

Respectfully,

B. F. TRACY,
Secretary of the Navy.

Lieutenant WM. J. BARNETTE, U. S. Navy,
U. S. T. S. Minnesota, Navy-Yard, New York.

It was in obedience to this order that the claimant served on the St. Mary's as executive officer.

XI.

The object of the nautical school is to instruct young men in maritime matters so as to fit them for any service connected with maritime life, leaving them free to go into the merchant marine or Navy. The instruction is in seamanship, navigation, sailmaking, and everything pertaining to a seaman's life.

XII.

The Navy Department when assigning officers to duty on school-ships has done so by orders similar in terms to that set forth in Finding X.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant should recover $780.25.

7 IV.—*Opinion of the court.*

NOTT, J., delivered the opinion of the court:

The claimant served as executive officer on the nautical school-ship St. Mary's. While the vessel was on a cruise he was allowed sea pay; while she was in the harbor of New York he was allowed shore pay. The vessel was manned and victualled by the State of New York, but owned and officered by the United States. The officers as instructors received their directions from the nautical school committee of the city of New York, but were always subject to the orders of the Navy Department, and if there had been a conflict of orders would unhesitatingly have obeyed the latter. The service was nominally for the benefit of the State, but really the United States had just the same interest in the ultimate object of the school—the building up of the American marine and the advancement of American seamanship. It was a kind of partnership in which both contributed to the cost and in which both shared in the general benefits.

The law of the State, by authority of which this nautical school existed, is as follows:

"SEC. 1068. The board of education are authorized and directed to provide and maintain a nautical school in said city, for the education and training of pupils in the science and practice of navigation; to furnish

accommodations for said school, and make all needful rules and regulations therefor, and for the number and compensation of instructors and others employed therein; to prescribe the government and discipline thereof, and the terms and conditions upon which pupils shall be received and instructed therein and discharged therefrom, and provide in all things for the good management of said nautical school. And the said board shall have power to purchase the books, apparatus, stationery, and other things necessary or expedient to enable said school to be properly and successfully conducted, and may cause the said school or the pupils, or part of the pupils thereof, to go on board vessels in the harbor of New York, and take cruises in or from said harbor for the purpose of obtaining a practical knowledge in navigation and of the duties of mariners. And the said board are hereby authorized to apply to the United States Government for the requisite use of vessels and supplies for the purpose above mentioned."

"SEC. 1070. The said board of education shall appoint annually at least three of their number, who shall, subject to the control, supervision, and approbation of the board, constitute an executive committee for the care, government, and management of such nautical school, under rules and regulations so prescribed, and whose duty it shall be, among other things, to recommend the rules and regulations which they deem necessary and proper for such school.

"SEC. 1071. After the establishment and organization of the said school, the expenses thereof, and of carrying out the provisions of this chapter, shall be defrayed from the moneys raised by law for the support of common schools in the city and county of New York."

"Laws New York, 105 session, Vol. II."

The law of the United States by authority of which the ship St. Mary's was placed at the disposal of the board of education of the city of New York as a nautical school-ship is as follows:

"That the Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the governor of the State, a suitable vessel of the Navy, with all her apparel, charts, books, and instruments of navigation, pro-
8 vided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each or any of the ports of New York, Boston, Philadelphia, Baltimore, Norfolk, and San Francisco, upon the condition that there shall be maintained at such port a school or branch of a school for the instruction of youths in navigation, steamship, marine enginery, and all matters pertaining to the proper construction, equipment, and sailing of vessels, or any particular branch thereof.

"And the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the Navy as superintendents of or instructors in such schools:

"*Provided*, That if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy, and the officers so detailed recalled:

"*And provided further*, That no person shall be sentenced to or received

at such schools as a punishment or commutation of punishment for crime."

"Act June 20, 1874 (18 Stat. L., 121)."

If the nautical school on this ship had been maintained, and for the same purposes, by the United States, instead of by the State of New York, not a doubt would exist as to the right of the officers to recover sea pay for services rendered on board of the ship while she was subject to and actually governed by seagoing rules and regulations. Such may now be considered as settled law since the decisions in Symond's Case (21 C. Cls. R., 153; 120 U. S., 46), Bishop's Case (21 C. Cls. R., 215; 120 U. S., 51), Strong's Case (23 C. Cls. R., 17; 125 U. S., 65–67), Aulick (27 C. Cls. R., 109).

The statute does indeed say (Rev. Stat., sec. 1571) that "no service shall be regarded as sea service except such as shall be performed at sea;" but a ship at sea does not necessarily mean, so it has been repeatedly held, a ship on the high seas. A ship officered, manned, victualled, equipped, and capable of proceeding to sea, on which seagoing service, discipline, and duty are required, though in a harbor, is within the intent of the statute, a ship at sea. The statute does not make an arbitrary or fanciful distinction in pay. Its imperative terms were intended to do away with a constructive sea service which formerly existed; and its manifest purpose is to help officers meet the additional expenses incident to sea service as compared with shore duty.

The nature of the service therefore which the claimant rendered was that of sea service; and the real question in the case is whether it comes within the restriction of an additional clause in the statute, "no service shall be regarded as sea service except such as be performed at sea under the orders of a Department and in vessels employed by authority of law." Was this service on the school-ship performed under the orders of the Navy Department and in a vessel employed by the authority of law?

Undoubtedly the school-ship on board which the claimant served was employed as a school-ship by authority of law. The Secretary of the Navy did not act illegally when he placed the vessel in this particular service. He had statutory authority for what he did, the act 20th June, 1874, before set forth.

The question, then, is narrowed down to this: Was the service performed under the orders of a Department? It is contended by the counsel for the defendant that the service was not performed under the orders of the Navy Department, but under the orders of the New York board of education or the executive committee of the nautical school.

The order which placed the St. Mary's on duty as a school-ship and, to a certain extent, at the disposal of the board of education,
9 did not transfer the vessel to any other authority than that of the United States. Possession, control, discipline, and authority were all retained by the Government. The officers doubtless carried out the directions of the board of education, but they did not do so because they were the orders of the board of education, but because they were sent by the Secretary of the Navy to New York to do so. If a ship were carrying a minister or envoy to foreign ports and the captain was ordered to sail here or there as he might be directed by the minister, can it be questioned whether he was sailing under orders of the Navy Depart-

ment? If one sends his carriage to take out a sick friend and tells the driver to go wherever the friend may direct him, is not the driver still acting under the orders of his own master? The provision was probably placed in the statute to prevent a person being placed on sea-service pay by any authority lower than that of a Department.

But it can not be questioned, we think, that the claimant proceeded to New York and reported to the commanding officer of the St. Mary's and did duty upon her, and was required to live on board and wear his uniform at all times and perform the duties of an executive officer on board of a ship at sea by the express order of the Secretary of the Navy. The service which he did perform, therefore, was sea service, and was performed by the direct order of the Secretary of the Navy.

The service which the claimant performed for the State of New York was a distinct and different thing. As executive officer he was paid by the United States; as instructor in the nautical school he was paid by the State of New York. The duties did not conflict; they were permitted by the Secretary of the Navy; it was doubtless understood by the Secretary of the Navy that they would be performed; it was indeed probable that if the claimant had not been willing to perform them and thereby cooperate with the board of education he would not have been assigned to the ship; but payment for this additional service by the party which received it does not in any way relate to or affect the rate of pay at which the claimant should be paid by the United States.

The judgment of the court is that the claimant recover $780.25.

10 V.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 18th day of March, A. D. 1895, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said claimant, William J. Barnette, do have and recover of and from the United States the sum of seven hundred and eighty dollars and twenty-five cents ($780.\frac{25}{100}$).

BY THE COURT.

11 VI.—*Application for and allowance of appeal.*

WILLIAM J. BARNETTE
vs.
THE UNITED STATES. } No. 18132.

From the judgment rendered in the above-entitled cause on the 18th day of March, 1895, in favor of claimant, the defendants, by their Attorney-General, on the 17th day of April, 1895, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. E. DODGE,
Assistant Attorney-General.

Filed April 17, 1895.
Allowed in vacation, August 2, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

12 In the Court of Claims.

WILLIAM J. BARNETTE
vs.
THE UNITED STATES. } No. 18132.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this third day of August, 1895.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed on cover:) Case No. 15999. Term No., 325. The United States, appellant, vs. William J. Barnette. Court of Claims. Filed August 21, 1895.

165-174

165-174

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

WILLIAM J. BARNETTE
v.
THE UNITED STATES. } No. 325.

APPELLANTS' BRIEF.

JOSHUA ERIC DODGE,
Assistant Attorney-General.
GEORGE H. GORMAN,
Assistant Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

WILLIAM J. BARNETTE
v.
THE UNITED STATES. } No. 325.

APPELLANTS' BRIEF.

The claimant was a lieutenant in the Navy of the United States at the time to be hereafter mentioned. On December 30, 1890, he having then completed about the ordinary period of three years' sea service, received from the Secretary of the Navy the following order:

NAVY DEPARTMENT,
Washington, December 30, 1890.

SIR: You are detached from the *Minnesota* on the 31st instant, and will report to Commander A. S. Crowninshield on the same day for duty as executive on board the nautical school-ship *St. Mary's* as the relief of Lieut. C. C. Cornwell.

This employment on shore duty is required by the public interests, and such service will continue until the 31st of December, 1893, unless it is otherwise ordered.

The school-ship *St. Mary's* had been furnished or loaned to the city of New York for the maintenance of a nautical school under the provisions of the act of June 20, 1874 (18 Stat. L., 121), which provides—

> That the Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the governor of the State, a suitable vessel of the Navy, with all her apparel, charts, books, and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each or any of the ports of New York, Boston, Philadelphia, Baltimore, Norfolk, and San Francisco, upon the condition that there shall be maintained at such port a school or branch of a school for the instruction of youths in navigation, steamship, marine enginery and all matters pertaining to the proper construction, equipment and sailing of vessels or any particular branch thereof.
>
> And the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the Navy as superintendents of, or instructors in, such schools.

This vessel customarily was a fixture at her dock from October until May, and from about the 15th of May until some time in October customarily went on a cruise for the education of the students. During all of the time, however, the claimant, like other officers, lived on board and was subject to the regulations of a ship at sea. During the period covered by the suit he has been allowed and paid the pay of a lieutenant in his rank on

shore duty while the vessel was at her dock, and the pay for sea service or sea duty while she was on a cruise. He claims to be entitled to compensation as for sea duty during all of the period, and upon that claim has been allowed by the judgment $780.25.

He has received pay from the City of New York for his services as an instructor of the pupils on said school-ship, in addition to his pay as lieutenant received from the United States.

ASSIGNMENT OF ERROR.

I. The Court of Claims erred in rendering judgment in favor of the claimant for $780.25, or for any sum.

II. The court erred in holding that the service of the claimant on board the school-ship *St. Mary's* was sea duty and entitled him to the compensation fixed by law for a lieutenant while on sea duty.

ARGUMENT.

In support of the claimant's contention, reliance is had upon the following decisions of the Supreme Court and of the Court of Claims:

Symonds's Case, 21 C. Cls., 153; 120 U. S., 46.
Bishop's Case, 21 C. Cls., 215; 120 U. S., 51.
Strong's Case, 23 C. Cls., 17; 125 U. S., 656, 657.
Aulick, 27 C. Cls., 109.

These were all cases of service on vessels directly employed in service of the United States.

The case of Symonds, *supra*, settles the doctrine that the sea pay given to officers of the Navy may be earned by services performed in a vessel in commission and

employed by authority of law, under the orders of the Navy Department, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to the service on the high seas; and that the authority of the head of an executive department to issue orders and regulations to have the force of law is subject to the condition that they conflict with no act of Congress; and that an order of the Secretary of the Navy that a service shall not be a sea service which Congress has directed shall be a sea service is invalid.

Bishop's Case, *supra*, is merely a reaffirmance of Symonds's Case.

Strong's Case, *supra*, is an affirmance, application, and extension of the doctrines of Symonds's Case to services performed upon a recruiting ship at anchor in port at a navy-yard and not in commission for sea service, provided the officer performing such service is required to live on board ship, mess there, wear his uniform, and is generally subject to the same rules and restrictions that govern him in service on the high seas. (See also *Corwine's Case*, 24 C. Cls., 104.)

Aulick's Case, *supra*, is practically a reiteration of the doctrine of Strong's Case, applied to a monitor at anchor in the James River, in a serviceable condition, manned, and capable of proceeding to sea, although she may require more men and stores in order to make her sea service effective.

Conceding full authority to these decisions, nevertheless the case at bar presents two conditions of fact, neither

of which was present in the cases which brought about the foregoing decisions, and which seem to exclude it from the scope of the doctrines which they announce.

To these elements of fact, and to their attendant consequences, the attention of the court is invited.

I.

The detail of the claimant for service on the nautical school-ship *St. Mary's* was made in accordance with the authority given in the act of June 20, 1874 (1 Supp. Rev. Stat., 25).

That act, in order to promote nautical education, authorizes and empowers the Secretary of the Navy "to furnish, upon application in writing from the governor of the State, a suitable vessel of the Navy, with all her apparel, charts, books, and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school" or college, at certain designated ports, naming them. Authority is given to the President of the United States, "when in his opinion the same can be done without detriment to the public service, to detail proper officers of the Navy as superintendents of, or instructors in, such schools." And it is provided that "if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy, and the officers so detailed recalled."

Thus it will be seen that, under this act, vessels are loaned by the Government to those nautical schools and

officers of the Navy are detailed as instructors to aid them in affording nautical instructions to their pupils. Beyond this the Government has nothing to do with them; and it does not, in any sense, maintain, operate, or conduct them. They are not, in any sense, schools conducted by the Government, as a sort of adjunct to the Navy, or for any other purpose. They are either private, State, or municipal schools that are assisted by the Government by the loan of a vessel and by allowing naval officers whose services are not required by the United States to aid as instructors and to receive pay from the schools. In the present case it is shown that the crew was employed and all the expenses incident to the use of the ship were paid by the city of New York, together with a handsome compensation to the various officers who were detailed on her as instructors.

Now, section 1556 of the Revised Statutes fixes the pay of the claimant at $2,600 per annum when at sea and at $2,200 per annum when on shore duty; and section 1571 declares that "no service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law." If we concede, then, that under the doctrines laid down in the decisions heretofore cited the services rendered by the claimant while the *St. Mary's* was tied to her wharf (he has been paid sea pay for all the time that the vessel cruised) were services rendered at sea, it still remains to be determined whether such services at sea were rendered "under orders of a Department and in a vessel employed by authority of law."

Of course the claimant was ordered to duty on the *St. Mary's* by the Secretary of the Navy, and to that extent he was acting "under the orders of a Department." But that is not the point. The inquiry is whether the particular service, at the particular time and in the particular manner in which it was performed, was so performed "by order of a Department;" that is, when the ship went on a cruise it went by "order of a Department," and when it was laid up at a wharf it was so laid up by "order of a Department." The record shows that this was not done. The entire control of the movements of the *St. Mary's* was in the proper authorities of the nautical school or municipal board, and the only authority that was exercised by the Navy Department over the United States officers thereon was in and about the regulations concerning naval discipline, etc.

Of course, too, the *St. Mary's* was lawfully employed, using the term lawful as the antithesis of unlawful. But, again, that is not the point. When the statute requires that the services must be rendered at sea "upon a vessel employed by authority of law," the meaning is that such vessel must be employed by authority of law in and about the business of the United States. Now, the evidence in the case at bar shows that the *St. Mary's* was employed in and about the business of the nautical school of the city of New York. The ownership of the vessel, to be sure, was in the United States, but the use of it had been loaned to, and was in the control of, the city, which manned it and equipped it and defrayed all its expenses and used it for purposes of its own.

The order of the Secretary of the Navy designates this service of the claimant as shore duty, and the assignment was made in regular turn after a period of duty at sea, in the interest of the public service. It is admitted that the orders of the Secretary of the Navy, when not in conflict with acts of Congress, have the effect of law (*Gratiot* v. *United States*, 4 How., 80; *Symonds* v. *United States*, 120 U. S., 47–50); and inasmuch, for the reasons already given, this order does not appear to be in conflict with section 1571, Revised Statutes, it is not perceived why such order should not be regarded as final.

II.

The second distinguishing element of fact to which we refer is the compensation that was paid by the city of New York to the various officers of the Navy who were assigned to duty on the *St. Mary's*, including the claimant. The evidence before the Court of Claims showed the amount so paid was much in excess of the difference between sea pay and shore pay.

To this, of course, it will be answered that such compensation was a mere gratuity, so far as the United States were concerned, and can not operate to deprive an officer of that rate of pay which the law has fixed for a certain class of service; and we are not insensible to the full force of such a contention as an abstract proposition of law. Considered, however, in connection with the facts of the case a bar, the answer is far more apparent than real, for the following reasons:

Without intending to question the correctness of the decisions to which we have heretofore referred, it must be

admitted that, upon the surface, at least, those cases appear to present an extreme construction of the law. When we remember that the statute (Rev. Stat., 1571) declares in positive terms that "no service shall be regarded as sea service except such as shall be *performed at sea*," it certainly does not become immediately manifest that a vessel grounded in 10 feet of mud at her wharf, roofed over, heated by steam from the shore, and incapable of being moved from her position, is *at sea*, or that service upon her is service "*performed at sea*." It is only when the additional expenses which it entails are made the test, and not the location of the ship, that we can hold that if the resultant expenses are identical with service upon a ship actually at sea, then the officer is entitled to sea pay.

The decisions, then, apparently disregarding the letter of the law, have conformed themselves in consonance with what is held to be the purpose of the statute and the reasons which actuated the lawmakers in fixing a higher rate of compensation for sea service than for duty on shore. The controlling, if not the only, reason suggested is that while at sea the officer can not reside with his family, but must, in addition to the expenses of his shore establishment, maintain his mess on board ship, and in this and in other ways be subjected to a greater personal expense than when on shore duty, in compensation for which a higher rate of pay is allowed him.

And the decisions of the courts, following this reason of the law, have laid it down that when the services required of the officer are such as to entail upon him the expenses incident to sea service, he shall be entitled to that rate of

compensation, albeit the ship upon which he serves is not at sea. But that reason can not be applied to the case at bar, because the claimant received from the city of New York a rate of pay nearly four times as great as the difference between sea pay and shore pay, and which was a full compensation for these additional expenses. The reason upon which these decisions rest having failed in the case at bar, it is not perceived why those decisions should be invoked in support of this case; and, *mutatis mutandis*, the attention of the court is directed to the maxim of the common law, "*Cessante ratione legis, cessat ipsa lex.*"

It seems to us that claimant's positions are distinctly inconsistent. Being on shore duty, with resultant pay, he rendered certain services to the State or city of New York not included, as he claims, within the duties of his then position and pay as a United States officer, which, if he had performed them for the United States, would have entitled him to some $400 per annum additional. He has accepted pay from the city of New York, and has thereby committed himself most conclusively to the proposition that such services were not performed for the United States and were not within the duties of his then position as a naval officer. If they were, he has committed a most gross official offense—that of taking pay from private individuals for performing his duty as a public officer. The only possible excuse or justification for his accepting this pay from the city of New York must consist in the fact that the extra services performed on this school-ship were not within but wholly outside of any duties imposed

on him by his superiors or his official position. The allowance of sea pay while actually on cruise, while perhaps inconsistent with this view, can not enhance the legal liability of the Government, for the reason that a ruling of a Department can not make law of that which is not law. (*Wis. Central Ry.* v. *U. S. Decided, Nov. 16, 1896.*)

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Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES,
APPELLANT,
v.
WILLIAM J. BARNETTE.
No. 325.

BRIEF FOR APPELLEE.

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Supreme Court of the United States.

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THE UNITED STATES, APPELLANT,
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WILLIAM J. BARNETTE.

No. 325.

BRIEF FOR APPELLEE.

The United States has appealed from a judgment rendered by the Court of Claims for $780.25 in favor of claimant for the difference between sea pay and shore pay, and for the value of a ration, for 559 days between January 1, 1891, and October 24, 1893. During the period named the claimant, an officer of the Navy, was on duty on board the naval vessel *St. Mary's*, under command of an officer of the United States Navy, this employment being in obedience to a written order of the Secretary of the Navy.

As found by the Court of Claims (finding VIII) the *St. Mary's* had been furnished to the State of New York for educational purposes by the Secretary of the Navy under the act of June 20, 1874 (18 Stat. L., p. 121), which is as follows:

"*Be it enacted*, &c.,—

"That the Secretary of the Navy, to promote nautical education, is hereby authorized and empowered to furnish, upon the application in writing of the governor of the State, a suitable vessel of the Navy, with all her apparel, charts, books, and instruments of navigation, provided the same can be spared without detriment to the naval service, to be used for the benefit of any nautical school, or school or college having a nautical branch, established at each or any of the ports of New York, Boston, Philadelphia, Baltimore, Norfolk, and San Francisco, upon the condition that there shall be maintained at such port a school or branch of a school for the instruction of youths in navigation, steamship, marine enginery, and all matters pertaining to the proper construction, equipment, and sailing of vessels, or any particular branch thereof.

"And the President of the United States is hereby authorized, when in his opinion the same can be done without detriment to the public service, to detail proper officers of the Navy as superintendents of or instructors in such schools:

"*Provided*, That if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy, and the officers so detailed recalled:

"*And provided further*, That no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime."

The claimant's contention is that inasmuch as this statute makes no provision for the pay of an officer of the Navy detailed pursuant thereto, the only rule for his compensation while so engaged is in the general laws relating to the pay of the Navy. He contends that as Congress has not in the matter of pay differentiated this service from all other naval duties, it is not for the courts to do so.

There is no question that for similar services on a naval vessel *not "furnished" under this act of Congress* he would be entitled to the $780.25 in controversy, and the question before the court is whether (and, if so, to what extent) the benefits derived by the State of New York from this vessel and from his services differentiate his compensation from that of other officers whose duties subjected them to the same restrictions and regulations.

The Attorney-General has not contended that the officer while serving on this detail (1) should receive no compensation from the United States, nor (2) that his pay should be restricted to waiting-orders pay, nor (3) that he should receive shore-duty pay while his vessel is on the high seas. He merely insists that while the *St. Mary's* is in the port of New York the naval officers attached thereto shall receive shore pay.

Section 1571, Revised Statutes, provides that

> "no service shall be regarded as sea service except such as be performed at sea, under the orders of a Department, and in a vessel employed by authority of law."

I.

The services of claimant while in the port of New York were performed, under the orders of a Department, for precisely the same reason that Simonds's services on the *New Hampshire* (120 U. S. 46) and Strong's services on the *Wabash* (125 U. S. 656) were performed by order of a Department, to wit, because each was ordered by the head of the Navy Department to report to a superior officer of the Navy for duty on board his vessel. The orders each received thereafter from his superior officer were to him the orders of the Department, and every

service performed by each under the orders of that officer was performed under the orders of the Department.

As a matter of fact, the court below finds that the claimant received orders, while on board the ship, from no one but the commanding officer, himself an officer of the Navy, and that his presence on the ship and his obedience to such orders were in obedience to the order of the Navy Department. There is no finding of fact that the movements of the vessels were controlled in any manner by the Nautical School of New York, or that her entry and departure from the port of New York were any less under the control and direction of her commanding officer than her entry into and departure from a foreign port. But even if the facts were as contended, it is not clear why the *entry into* the port of New York would be any less "under the orders of a Department" than her *departure from* that port, and yet claimant received sea pay after the *St. Mary's* went to sea, and is denied it after her return to port.

II.

It is urged by appellant:

> "When the statute requires that the services must be rendered at sea 'upon a vessel employed by authority of law' the meaning is that such vessel must be employed by authority of law in and about the business of the United States."

Congress, for reasons satisfactory to itself, did not insert the words "in and about the business of the United States" in section 1571, and it seems to us too clear for argument that a vessel employed by authority of law is in its fullest sense employed in and about the business of the United States, and that the decision of Congress, if

not contrary to the Constitution, is of controlling force as to what is and what is not the business of the United States. The court below was of opinion that the United States had the same interest in the object of the Nautical School, to wit, nautical education, as had the State of New York. Of this there can be no doubt, but the strongest evidence in support of that opinion is the legislation of Congress now under consideration.

III.

It is true that the order of the Secretary of the Navy designated this service as shore duty, and if the order was effective in itself to make service in New York harbor shore duty it was of equal efficacy on the high seas, but on the high seas he has been paid sea pay. This court has already decided that the order of the Secretary of the Navy by calling service either "sea service" or "shore duty" does not make it either one or the other. In United States *v.* Symonds, Mr. Justice Harlan said (120 U. S., p. 49): "Congress did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service."

IV.

In addition to the care of the vessel, her apparel, charts, books, and instruments of navigation and the discipline of the ship, claimant's duties included the nautical education of the pupils who had been placed on board by the committee of the Nautical School of New York, in conse-

quence of which the board of education of that city has seen fit to give him an annual stipend. The effect of this gift upon the statutory salary of claimant presents the only question which has not already been passed upon by this court.

It appears by finding X (p. 4 of the record) that the Navy Department alternates the duties of officers between sea service and shore duty; that the claimant for the two years and a half preceding this duty had been cruising on the U. S. S. *Galena*, a man-of-war; that the Secretary of the Navy in sending him to the *St. Mary's* notified him that this employment was shore duty. Pursuant to the routine mentioned, claimant, by the terms of his order to the *St. Mary's*, was notified to expect that at the expiration of his duty on the *St. Mary's*, to wit, December 31 1893, he would be again ordered to a man-of-war for another three years, thus making for him a continuous service of eight years and a half "subject to the regulations" and the hardships of sea life. The duration of sea service was entirely in the discretion of the Secretary of the Navy, and the authorities of the city of New York may have been influenced in their donation to claimant by the seeming severity with which the Department treated this service in parceling out his life between ship and shore, and by the further fact, found by the court below, that his expenses were much greater on board the *St. Mary's* than on board a man-of-war.

There is no suggestion in the record that the claimant neglected any of his duties to the United States, and of such performance the same supervision was exercised as over all naval officers (see finding IV, p. 3).

This gratuity, donation, or compensation from the city of New York did not vary with location of the vessel; it does not appear from the record that it was greater or less

when the *St. Mary's* was in New York harbor than when she was on the Mediterranean Sea. It bore no relation to the increase of expense of sea life over shore life. This being the case, the rules and the reasoning laid down by this court in the cases, Symonds, 120 U. S. 46, Bishop case, 120 U. S. 51, Strong, 125 U. S. 656, are as applicable to service on the school ships as to service on the vessels under discussion in those cases.

The findings of the Court of Claims are very clear that claimant's relation to his mess, state-room, and uniform, to the preservation of the ship, and its police was the same whether the vessel was under sail, riding at anchor, or tied to a wharf (findings VI and VII), and that when the vessel was not on a cruise and attached to the dock in New York the claimant lived on board, did the duty, and was subject to the regulations of a ship at sea.

We do not claim, as stated in the brief for appellant, that the services rendered by claimant to the State of New York were not included within the duties of his then position. Most distinctly we say that they ~~was~~ were within his duties to the extent that he was thereunto directed by his commanding officer. There is nothing in the record to show that he went beyond those directions.

In substance, the accounting officers have endeavored to forfeit to the United States a portion of the statutory compensation of the claimant, basing the forfeiture upon an asserted impropriety in claimant's reception of the purely voluntary gift or donation of the city of New York. Such withholding of claimant's salary is open to the objection that it is an *ex post facto* proceeding, and further, is an assumption of the law-making power.

Neither the officers of the School Board of New York city, nor the Secretary of the Navy, nor the Court of Claims, have seen any impropriety in his conduct. It has